

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JEROME GEMAR,

Appellant.

No. 38467-1-II

UNPUBLISHED OPINION

Bridgewater, J. — Michael Jerome Gemar appeals from his jury conviction for a felony violation of a domestic violence no-contact order that prohibited him from contacting his mother. We affirm.

**FACTS**

Gemar was arrested in his mother's garage after he acknowledged that there was an order prohibiting him from frequenting the residence. The State charged Gemar with one count of felony violation of a no-contact order under RCW 26.50.110(5). The State alleged that Gemar had two or more prior qualifying convictions for violation of a no-contact order, which allowed the State to charge Gemar with a felony rather than a misdemeanor.

At the time of the December 2007 incident, Gemar had several previous convictions under RCW 26.50.110 for violating no-contact orders that prohibited him from contacting his mother: (1) a December 2006 conviction for a violation on December 5, 2006; (2) two April 2007 convictions for violations on December 1, 2006; (3) a January 2007 conviction for a violation on

January 28, 2007; and (4) two May 2007 convictions for two violations on February 24, 2007. Each of the complaints or citations underlying these convictions listed the chargeable offense as a violation of a domestic violence protection order under RCW 26.50.110.

For example, the amended information underlying the May 2007 convictions stated that each of these offenses involved a violation of a “valid protection order pursuant to Chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW.” Ex. 13. Gemar did not challenge the validity of any of the previous no-contact orders.

Prior to trial, Gemar and the State entered into several stipulations. Gemar stipulated that he was the individual named on any court-admitted judgment and sentence; domestic violence no-contact order; and complaint/citation, information, or amended information.

At Gemar’s jury trial, the trial court admitted Gemar’s four previous citations and informations with their four corresponding judgment and sentences; each violation had occurred before the December 2007 incident.<sup>1</sup> The State did not introduce Gemar’s stipulations into evidence. The jury found Gemar guilty of violating the May 2007 no-contact order. The jury also returned a special verdict, finding that Gemar had two or more prior convictions for violation of a no-contact order. Based on the special verdict, the trial court classified Gemar’s current conviction as a felony.

#### ANALYSIS

First, Gemar contends that the State failed to provide substantial evidence of his identity

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<sup>1</sup> The State did not offer into evidence copies of any of the original no-contact orders that were the bases for the previous complaints and judgments.

for the judgments and the no-contact order admitted into evidence. Specifically, he claims that the State's reliance on the identity of his name, without more, is insufficient to establish that he is the individual named in the documents.

While Gemar contends that he raises a sufficiency of evidence question that is not the dispositive issue. Rather, the dispositive issue is whether he waived the requirement that the State prove the element he now contests by stipulating to that element.

The premise of the waiver theory is that upon entering into a stipulation on an element of a crime, a defendant waives his right to put the government to proof of that element. *State v. Wolf*, 134 Wn. App. 196, 199, 139 P.3d 414 (2006), *review denied*, 160 Wn.2d 1015 (2007). Here, Gemar stipulated that he was the individual named on any court-admitted judgment and sentence; domestic violence no-contact order; and complaint/citation, information, or amended information. By entering into this stipulation, Gemar waived his right to assert the State's duty to present evidence to the jury on the stipulated element. *Wolf*, 134 Wn. App. at 199.

Gemar relies on *State v. Hunter*, 29 Wn. App. 218, 627 P.2d 1339 (1981), but the defendant in that case did not stipulate that he was the person named in the prior judgments. *Hunter* does not apply.

Second, Gemar contends that the State failed to demonstrate that two or more of his prior convictions arose from violations of a qualifying no-contact order. Although Gemar attempts to characterize his argument as a challenge to the sufficiency of the evidence, *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005), establishes that his claim actually relates to the admissibility of his prior violations, which support the State's contention that he had two or more qualifying

court orders issued against him. In *Miller*, our Supreme Court (1) held that “the validity of [an] underlying no-contact order is not an element of the crime of violating such order”; and (2) noted that the trial court, as gatekeeper, should make an initial determination of whether the crime charged has support from alleged violated orders and whether those previous orders are applicable and, thus, admissible. *Miller*, 156 Wn.2d at 31-32.

If the trial court determines that a previous order is applicable, “[i]ssues of sufficiency relating to the order may be argued and resolved in the same manner as any other question relating to the sufficiency of the evidence.” *Miller*, 156 Wn.2d at 32. Thus, under *Miller*, the trial court has the initial responsibility of determining the relevance and admissibility of the underlying no-contact order violations. *Miller*, 156 Wn.2d at 31.

Admissibility of evidence is within the trial court’s sound discretion, which we will not reverse absent a showing of abuse of that discretion. *State v. Brown*, 132 Wn.2d 529, 578, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). “An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court.” *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The trial court abuses its discretion if exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev’d on other grounds*, 99 Wn.2d 538 (1983).

The State charged Gemar with felony violation of a no-contact order under RCW 26.50.110(5), which provides in relevant part:

A violation of a court order issued under this chapter [chapter 26.50], chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter [chapter 26.50], chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

In support of this charge, the State presented the four previous judgment and sentences discussed above. The State also submitted copies of the original citations or charging informations. Here, although most of the exhibits did not specify the exact basis of the underlying no-contact orders, the trial court admitted the exhibits because the evidence established that the previous convictions involved orders issued under chapter 26.50 RCW. The exhibits included criminal citations that categorized the chargeable offense as violations of RCW 26.50.110, one of the qualifying statutes. These documents also specified Joyce Gemar's residence as the location of the violation, an indication that previous no-contact orders were similar to the order the superior court issued in May 2007 under chapter 10.99 RCW.

The exhibits the State offered supported the trial court's finding that Gemar's previous no-contact order violations were issued under one of the specified statutes listed in RCW 26.50.110(5). Accordingly, although the State did not offer into evidence the underlying no-contact orders, we cannot say the trial court abused its discretion in admitting the previous complaints and judgments into evidence as sufficient proof that the previous no-contact order violations were felony-qualifying convictions under RCW 26.50.110.

Gemar mistakenly relies on *State v. Arthur*, 126 Wn. App. 243, 108 P.3d 169 (2005),

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where this court held that the validity of prior convictions for violations of no-contact orders is an element of felony violation of an no-contact order. *Arthur*, 126 Wn. App. at 244. *Miller* specifically overruled this holding. *Miller*, 156 Wn.2d at 31 (holding to the extent that *Arthur* is inconsistent, it is overruled).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Bridgewater, J.

We concur:

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Armstrong, J.

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Penoyar, A.C.J.